

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 10-0364

GARY SWENSON, JR.,

Petitioner and Appellant,

FILED

v.

AUG 10 2010

ORDER

STATE OF MONTANA,

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Respondent and Appellee.

Gary Swenson, Jr. (Swenson) filed a Notice of Appeal and a letter to this Court requesting that we allow his late postconviction appeal. In the letter, he states that he received the decision from the Seventh Judicial District Court, Richland County on April 2, 2010. The Notice of Appeal indicates that the judgment was entered on April 5. Swenson filed a timely Notice of Appeal with the District Court on May 31, 2010 and properly served a copy upon the County Attorney and Attorney General. We deem the letter a petition for an out-of-time appeal under M. R. App. P 4(6).

On June 23, Swenson learned that the Clerk of Supreme Court had not received his Notice of Appeal. Swenson attempted to file a Notice of Appeal with the Supreme Court on July 28, 2010. He contends that his failure to file the original Notice of Appeal with the Clerk of Supreme Court was an honest mistake, and that he believed he had properly filed a timely appeal.

The M. R. App. P. allows an out-of-time appeal when extraordinary circumstances amounting to a gross miscarriage of justice are presented. Swenson is incarcerated and believed he had filed a timely appeal with the proper court. Under these circumstances, we deem it appropriate to grant the request for an out-of-time appeal.

IT IS ORDERED:

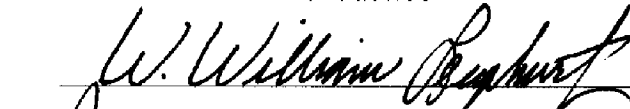
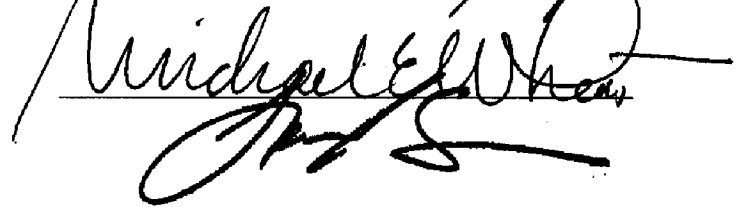
1. The motion for leave to proceed without paying the filing fee is GRANTED.
2. Swenson's request that he be allowed to file an out-of-time appeal is GRANTED.

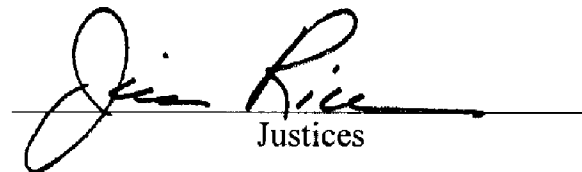
The Clerk is directed to file the Notice of Appeal date stamped July 28, 2010. The Montana Rules of Appellate Procedure shall govern the filing of the record and briefs on appeal.

The Clerk is directed to provide copies of this order to counsel of record and to Swenson.

DATED this 10th day of August, 2010.


Chief Justice


Justices